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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/659,908	09/11/2003	Barbara Ann Kuhns	CWELC.00013	4195
22858	7590	07/26/2005	EXAMINER	
CARSTENS YEE & CAHOON, LLP P O BOX 802334 DALLAS, TX 75380			DONOVAN, MAUREEN C	
			ART UNIT	PAPER NUMBER
			1761	

DATE MAILED: 07/26/2005

Please find below and/or attached an Office communication concerning this application or proceeding.

<b>Office Action Summary</b>	Application No. 10/659,908	Applicant(s) KUHNS ET AL.	
	Examiner Maureen C. Donovan	Art Unit 1761	

**-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --**

**Period for Reply**

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

**Status**

- 1) ☒ Responsive to communication(s) filed on 11 April 2005.
- 2a) ☒ This action is **FINAL**.                      2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

**Disposition of Claims**

- 4) ☒ Claim(s) 1-21 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-21 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

**Application Papers**

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

**Priority under 35 U.S.C. § 119**

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All    b) ☐ Some \* c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

**Attachment(s)**

- |  |   |
|--|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892)  | 4) <input type="checkbox"/> Interview Summary (PTO-413)<br>Paper No(s)/Mail Date. _____ |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948)                                   | 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152)             |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)<br>Paper No(s)/Mail Date _____ | 6) <input type="checkbox"/> Other: _____  |

### **DETAILED ACTION**

1. This action is in response to communications: Amendment filed 11 April 2005.
2. Claims 1-21 are pending.
3. The rejection of Claims 1-13 under 35 U.S.C. 112, first paragraph is withdrawn in view of applicant's amendments. An amendment to correct an obvious error does not constitute new matter where one skilled in the art would not only recognize the existence of error in the specification, but also the appropriate correction. In re Oda, 443 F.2d 1200, 170 USPQ 268 (CCPA 1971). It is agreed that from the examples given by the applicant and the state of the art, one of ordinary skill in the art would know that the use of 20 grams of calcium would be incorrect and that milligrams would be the correct unit.
4. The rejection of Claims 1,2,3,4,6,7,8,9,10,11,13,14,15,16,17,19,20 and 21 that were provisionally rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over copending Application No. 10/417473 is withdrawn in view of the express abandonment of Application No. 10/417473.

### ***Claim Objections***

1. Claim 1 is objected to because of the following informalities: It appears that applicant missed correcting a step number when amending the claims. Step d) of claim 1, states that the fruit is added to the mixture obtained from step b), however step b) now performs a different action as a result of the amendments. There is a lack of support in the claims for adding the fruit to the calcium heated liquid fraction and also makes the list of processing steps confusing and somewhat backwards (adding the fruit of step d) then in step c) adding the ingredient of a)), therefore it is interpreted that this was an oversight during the amending process and the step b) as recited in step d) of claim 1 should be step c). For examining purposes only, the claim will be treated as reading "d) adding a fruit component to the mixture obtained from step c)". Appropriate correction or clarification is required.

***Claim Rejections - 35 USC § 103***

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

The factual inquiries set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

1. Determining the scope and contents of the prior art.
2. Ascertaining the differences between the prior art and the claims at issue.
3. Resolving the level of ordinary skill in the pertinent art.
4. Considering objective evidence present in the application indicating obviousness or nonobviousness.

1. Claims 1,2,3,6,7,8,9,12,13,14,15,17,18 and 19 are rejected under 35 U.S.C. 103(a) as being unpatentable over Fleury, US patent number 5,820,903 in view of Malone, US patent number 4,430,349.

Fleury discloses a method for preparing a yogurt, wherein a stabilizer is hydrated in milk (see Column 4, lines 10-16), then the milk mixture is heated to 75°C (see Column 4, lines 20-23). Fleury discloses that a separate liquid fraction of calcium and water is made and heated to 73.9°C to 87.8°C (see Column 6, lines 8-12 and Column 7, lines 1-5). Fleury discloses using 0.25% to 0.76% by weight of calcium (see Column 5, lines 20-32). Fleury discloses that the liquid fraction and the milk mixture are then mixed together (see Column 7, lines 15-25). Fleury discloses that a fruit component is then added to the total mixture (see Column 7, lines 47-68 and Column 8, lines 1-12). Fleury discloses that the fruit is added to the total mixture after it is cooled to 5°C and does not disclose cooking or heating of the fruit following mixing, therefore it is inherent that the fruit is maintained at a temperature below which cooking would occur (see Column 7, lines 20-24). Fleury discloses the use of fruits such as strawberry, raspberry, peachm lemon, orange, apple, etc (see Column 8, lines 1-5). Fleury discloses the use of stabilizers and thickeners in the product, prior to the mixing step (see Column 4, lines 10-16). Fleury discloses that the

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mixing step is conducted with warm slurry and warm yogurt base, which is interpreted to be a temperature above the gelation temperature of the pectin. Fleury discloses mixing of all the proper ingredients, therefore it is considered inherent that when mixed, these ingredients would attain a homogeneous gritty or grainy appearance, absent convincing evidence or arguments to the contrary. As the Patent Office does not possess the facilities to test the referenced composition and that of the claimed invention, the burden then shifts to applicant to demonstrate any patentable difference between the two. It is also considered inherent that addition of the fruit, which is not heated, would reduce the temperature of the total product, since that is basic heat transfer, additionally since the total product of Fleury is not heated after the addition of the fruit, the fruit will not be cooked. Fleury discloses a product produced by the method as described above.

Fleury does not disclose the use of a fruit juice concentrate or puree as part of the calcium liquid fraction. It would have been obvious to one of ordinary skill in the art at the time of the invention to have used a fruit juice concentrate or a puree for the water source as disclosed by Fleury, since the juice or puree would provide the water and citric acid as required by Fleury, as well as provide natural flavors and colors to the product, making the product more natural and reducing the amount of additional acids, flavors and colors required to be added, therefore saving time and money in production.

Fleury does not disclose the rate at which the liquid fraction is added to the milk mixture. It would have been obvious to one of ordinary skill in the art at the time of the invention to have mixed the ingredients together at a rate commensurate with the volume and viscosity of the product as well as within the range of the equipment available in order to have all the ingredients properly mixed and incorporated with each other, and it would have not involved an inventive step for one of ordinary skill to utilize a rate within the range as instantly claimed.

Fleury does not disclose using pectin as the stabilizer or how much should be added to the product.

Malone teaches a yogurt of the same basic composition as disclosed by Fleury. Malone teaches the use of a low methoxyl pectin to stabilize the product and maintain its texture during storage (see Column 2, lines 1-30). Malone teaches that using a concentration of 0.35% to 3% low methoxyl pectin in the product (see Column 3, lines 46-65).

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It would have been obvious to one of ordinary skill in the art at the time of the invention to have used the pectin of Malone, in the concentration as taught by Malone for the pectin as disclosed by Fleury, since the pectin of Malone will provide a final product that is stable, firm and not contaminated (see Column 2, lines 1-12) as well as being free of off flavors and or colors (see Column 4, lines 28-31). In addition it would have been obvious to use the pectin of Malone since Fleury discloses the use of stabilizers, but does not disclose the type of stabilizer or amount to use, therefore the ordinarily-skilled artisan would have necessarily referred to teachings of known yogurt stabilizers in the art in order to carry out said procedure, such as that of Malone. Malone specifically states that low methoxyl pectin is desirable to use as a stabilizer in a yogurt food product and teaches what is the most desirable amount to create a stable product, and thus it would not have involved an inventive step for one of ordinary skill in the art to have utilized pectin for the production of a yogurt, as instantly claimed.

The concentration of pectin as taught by Malone would create a product with a milligram of calcium per gram of low methoxyl pectin content within the range as claimed in claim 1.

2. Claims 4-5 are rejected under 35 U.S.C. 103(a) as being unpatentable over Fleury in view of Malone as applied to claims 1,2,3,6,7,8,9,12,13,14,15,17,18 and 19 above, and further in view of Daravingas, US patent number 6,235,320.

Fleury in view of Malone disclose all the features of the instantly claimed invention except for the use of xanthan as a thickner.

Daravingas teaches a yogurt composition containing xanthan gum (see Column 7, lines 8-18), in an amount ranging from 0.2% to 2% by weight. It would have been obvious to one of ordinary skill in the art at the time of the invention to have used xanthan gum as taught by Daravingas in the product of Fleury in view of Malone in order to get a final product with a good viscosity and consistency, and since as taught by Daravingas the use of a xanthan gum additive is well known in the art and are commercially available (see Column 7, lines 8-25), adding a known yogurt ingredient to a yogurt not involving an inventive step.

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Using the xanthan of Daravingas in the amount as taught in the product of Fleury in view of Malone would create a yogurt with a thickener to pectin ratio within the range of 1:4 to 1:30, which includes the range as claimed in claim 5.

3. Claims 10, 11 and 16 are rejected under 35 U.S.C. 103(a) as being unpatentable over Fleury in view of Malone as applied to claims 1, 2, 3, 6, 7, 8, 9, 12, 13, 14, 15, 17, 18 and 19 above, and further in view of Cote, US patent application number 2003/0211218.

Fleury in view of Malone disclose all the features of the instantly claimed invention except for the use of frozen fruit.

Cote teaches using a frozen fruit when mixing with the yogurt base (see section 0010). It would have been obvious to one of ordinary skill in the art at the time of the invention to have used a frozen fruit for the fruit of Fleury since the frozen fruit would minimize moisture equilibration and intermixing between the yogurt layer and the fruit and would extend the shelf life of the product (see section 0010).

4. Claims 20 and 21 are rejected under 35 U.S.C. 103(a) as being unpatentable over Uncooked Jam and Jellies by Pamela Brady in view of the combination of Jam Today! With Pomona's Universal Pectin online publication and Food Product Design article by Paula Frank.

Brady disclosed a method for making a no-cook food sauce including the steps of dissolving pectin in water and adding a fruit component to the pectin (see Page 1). It is inherent that when adding the hot pectin composition to the fruit that the temperature is reduced to a point below which cooking of the fresh fruit would occur since this is a no-cook recipe, meaning that the fruit is not cooked. Brady disclosed that frozen fruit can be used and the use of blackberries (see Page 1).

Brady does not disclose using a thickener, a low methoxy pectin or calcium.

Jam Today! disclosed that Pomona's Pectin is a low methoxyl pectin that could be used in place of regular pectin to make sugar-free jams including no-cook jams (see Page 2). Pomona's Pectin disclosed that the pectin is activated by calcium and that calcium is added to the jam to activate the pectin (see Page 1 and Page 3), and is added in the form of calcium water as evidenced by Cathy's Corner publication (see Page 1, 1<sup>st</sup> paragraph). It would have been obvious

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to one of ordinary skill in the art at the time of the invention to have used the low methoxyl pectin and calcium of Jam Today! for the jam of Brady in order to make a freezer jam that was sugar-free.

Frank taught using a thickener to prevent the fruit in a jam from floating to the top of the product (see Page 3, 3<sup>rd</sup> Paragraph). It would have been obvious to one of ordinary skill in the art at the time of the invention to incorporate a thickener as taught by Frank in the fruit jam composition as disclosed by Brady as modified by Jam Today! since both are directed to jams and since the thickener would improve the product quality and prevent the fruit from floating to the top of the jam.

### *Response to Arguments*

5. Applicant's arguments, filed 11 April 2005, with respect to the rejection(s) of the claim(s) under 35 USC 102(b) and 35 USC 103(a) over Moirano, US patent number 3556810 have been fully considered and are persuasive. Therefore, the rejection has been withdrawn. However, upon further consideration, a new ground(s) of rejection are made as seen above.

Applicant's arguments filed 11 April 2005 have been fully considered but they are not persuasive. At pages 16-19 of the response, applicant states that substituting low methoxyl pectin for high methoxyl pectin would not work. This is not deemed persuasive. It is submitted that the rejection presented above is not only a switch of low methoxyl pectin in for high methoxyl pectin, but is also contains the fact that calcium should be used. The applicant states that the switch would not work because it would require cooking and since the reference is directed to a no-cook recipe, the switch is not appropriate. It is submitted however that the Jam Today! reference teaches that the low methoxyl pectin can be used in no-cook recipes, therefore absent a convincing evidence or arguments to the contrary that show that Jam Today! is incorrect, and that low methoxyl can not be used in no-cook recipes, that part of the rejection is maintained. Since the rejection overall involves the use of low methoxyl pectin *and* calcium in place of high methoxyl pectin, and since the low methoxyl pectin is disclosed as being useable in a no-cook jam, it is interpreted that the combination of ingredients is appropriate.

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At page 17 of the response, applicant states that the dates of the references of Brady and Jam Today do not pre-date the current application's priority. The examiner has provided printouts for each reference from the "Internet Archive Wayback Machine" showing that the webpage contained the content used as a reference prior to the priority date of April 15, 2003. Please note, it is not when the page was last updated that is of importance but rather the earliest date which contained the content, which for Jam Today was May 1, 2001 and for Brady was April 12, 2001. The applicant is welcome and invited to go to the "Internet Archive Wayback Machine" to see that indeed the content was available on those dates. Printouts are attached again with this action, these printouts are from the dates listed above.

At page 19 of the response, applicant states that Brady does not teach the use of frozen fruits, but rather thawed frozen fruit. It is submitted however that Brady's disclosure of "Uncooked jams can be made from some fresh fruits and from frozen fruits" is enough to meet the limitations of claim 21. Additionally it is submitted that the starting state of the ingredients is what is important since any frozen berry would thaw inherently when mixed with a warmer mixture, and therefore would not remain frozen in the mixture.

At page 18 of the response, applicant states that Brady does not disclose that the addition of fruit will reduce the temperature. It is submitted however that addition of a frozen fruit or any ingredient to a warmer mixture, would reduce the temperature of the resulting product based on heat transfer. Also, it is submitted that since the Brady reference does not disclose cooking the fruit and maintains that the jam keeps a fresh fruit flavor, the reference is sufficient in teaching that the cooking of fresh fruit will not occur.

### *Conclusion*

6. Applicant's amendment necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP § 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire **THREE MONTHS** from the mailing date of this action. In the event a first reply is filed within **TWO MONTHS** of the mailing date of this final action and the advisory action is not mailed until after

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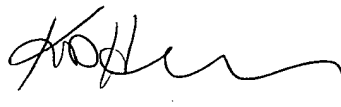
the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Maureen C. Donovan whose telephone number is (571) 272-2739. The examiner can normally be reached on 8:30-5:00.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Milton Cano can be reached on (571) 272-1398. The fax phone number for the organization where this application or proceeding is assigned is 703-872-9306.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

MCD

  
**KEITH HENDRICKS**  
**PRIMARY EXAMINER**